SYKT. PISCES

v.

HOWOOD PRODUCTS (M) SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. F 650 OF 1984]
4 OCTOBER 1985

CONTRACT: *Work done - Latent defects - Delay in discovery of defects - Auditors - Whether agents of defendant - Breach of duty.*

CIVIL PROCEDURE: *Claim for work done - Liability - Counterclaim - Final judgment - Appeal.*

The plaintiff claimed against the defendant for work done under an agreement between them in 1979. Under the said agreement, the plaintiff agreed to supervise the installation of a dry kiln chamber and the construction of a timber shed at the defendant's premises. The defendant denied liability for the sum claimed and also counterclaimed for loss incurred as a result of latent defects which it is claimed arose from the plaintiff's breach. Final judgment was entered by the Senior Assistant Registrar against the defendant and the defendant is appealing from this decision.

Held:
On the facts and on the law, it was found that certain relevant and important issues had been raised by the defendant. Since these issues could only be determined by oral evidence, this was not a clear cut case for which final judgment can be entered for the plaintiff.

[Appeal allowed with costs. Leave granted to defendant to defend this action.]

Case referred to:
Re Transplanters (Holding Co.) Ltd. [1958] 1 WLR 8-2

For the defendant/appellant - Teh Boon Eng; M/s. Teh & Associates
For the plaintiff/respondent - Joginder Singh; M/s. Joginder Singh & Co.

JUDGMENT

Siti Norma Yaakob J:

The plaintiff's claim against the defendant is for the sum of RM105,667 being the balance sum due for works done under an agreement dated 17 February, 1979, wherein the plaintiff agreed to supervise the installation of a dry kiln chamber and the construction of a timber shed (hereinafter referred to as "the plant") at the defendant's premises.

The defendant denies liability for this sum on the ground that the plant had not been installed and constructed according to specifications and that the latent defects that had been subsequently discovered appear in para. 4 of the Statement of Defence. In addition to denying liability, the defendant has also raised a counterclaim for a sum well in excess of the plaintiff's claim being the loss incurred as a result of the plaintiffs breach.

Following the filing of the Memorandum of Appearance, the plaintiff proceeded to apply to enter final judgment against the defendant and the Senior Assistant Registrar who heard the application allowed such an application. Dissatisfied with this decision, the defendant appealed to me.

It is not disputed that the works undertaken by the plaintiff had been commissioned and completed on 20 September 1980 and the defendant had been running the plant and had acknowledged the debt due since that date. However, it was only in July, 1983, that the defendant complained of the plaintiff's defective works and such complaints are supported by the reports of a firm of Consulting Civil and Structucal Engineers and a Roofing Specialist who had been engaged especially by the defendant to study the nature and extent of the defects. The plaintiff maintains that the two specialists' reports are dishonest reports and the fact that such complaints were only received 3½ years after the plant had been put into use lends support to the contention that the defendant is only raising the issue now to escape liability.

On the face of the two specialists' reports, it would appear that the alleged defective works relate to latent defects which could not be easily determined by a cursory examination of the plant and in all probability the fact that they manifest themselves 3½ years later confirmed the defendant's contention that the defects were in fact latent defects in which case the intervening period between the completion of the plant and the discovery of the latent defects itself becomes an issue as to whether the defendant can raise such defects as a defence.

Under cl. 2.1 of the agreement, the plaintiff was required to put up detailed drawings and specifications of the plant and such detailed drawings and specifications were to be the property of the defendant. In the event of any discrepancy between the detailed drawings and the specifications, the specifications shall prevail and deemed to be correct and binding notwithstanding the drawings. There is evidence appearing as Exhibit KYH 61 attached to the plaintiff's Affidavit dated 15 March 1985, that the third party named in the agreement and involved in the actual installation and construction of the plant had notified the defendant that he was installing and constructing the plant in accordance with instructions given by the plaintiff and as such instructions were contrary to the defendant's plans and specifications, the third party gave due notice that he shall not be held liable for any damage resulting from such discrepancy. This unrebutted evidence would appear to have a significant bearing as to whether the defective works alleged were defects which had been known to the defendant all along.

Other than stating that the two specialists' reports were dishonest reports, the plaintiff had not taken any step to challenge them. That could easily be done by the submission of an independent report by specialists to be agreed by both parties. This was not done and only oral evidence can determine whether the reports were made *mala fide*.

The plaintiff also relies on the defendant's written admission of its indebtedness to the plaintiff. This is evidenced by a letter dated 22 December 1981 which is Exhibit KYH 49 attached to the plaintiff's Affidavit dated 15 March 1985. In considering this admission I had not forgotten the fact that the defects were only discovered in July 1983 and as such when admitting liability on 22 December 1981, the defendant was not aware of the true state of the plant. On the same token, too, I placed no reliance on the written confirmation dated 22 September 1982 made by the defendant's auditors of the balance of debt due from the defendant as such confirmation was made before the defects were discovered. In this respect, can the auditors be regarded as agents of the defendant whose acts bind the defendant? In *Re Transplanters (Holding Co.) Ltd.* [1958] 1 WLR 8 - 2, Wynn-Parry J held that "an auditor of a company is (apart from any special contract) not an agent of the company at any rate for the purpose of being able to bind the company by merely signing the normal certificate at the foot of the balance sheet". In this case there is no evidence to show any special contract existing between the auditors and the defendant and to that extent they cannot be regarded as agents of the defendant.

On the facts and on the law I find that the following issues have been raised by the defendant.

(1) Whether the plaintiff as engineers of the project and all persons employed by them have breached their duties under the agreement.

(2) Whether the alleged defective works are latent defects which could not have been determined at the time the plant was completed.

(3) Whether the defendant's admission of indebtedness made prior to discovery of the defective works can be held against the defendant.

(4) Whether the defendant's auditors can be regarded as agents for the purpose of admission of liability.

As these issues can only be determined by oral evidence, I concluded that this is not a clear cut case for which final judgment can be entered for the plaintiff. On that finding, I had allowed the appeal with costs and granted leave to the defendant to defend this action.

Also found at [1986] 1 CLJ 86